Gallagher and Associates, PLLC
COUNSELOR AND ATTORNEY AT LAW

February 11, 2009

Senate Sub-Committee on Local Government
Attn: Chairman John Esp

RE: Senate Bill #345

Chairman Esp and Members of the Committee,

I am a Land Use Attorney with Gallagher and Associates, PLLC, in Helena, Montana. I urge your passage of SB345 in its entirety. This bill will enhance predictability, provide and clarify certain aspects of the zoning process while maintaining the check and balance between local governments authority to zone (to take certain property rights without compensation) and a landowner's right to use their property as they see fit.

I support the modifications found in Section 2 effecting 76-2-205 providing for enhanced notice provisions. A common statement made to me by people effected by zoning is "I didn't even know they were considering zoning my property." Currently, two notices, buried in the legal notices section of the paper are inadequate considering the substantial impact zoning can have on the value and use of the property owners. The mailed notice requirements contained in the amendment are consistent with other statutory notification requirements dealing with real property.

The modification to Subsection 6, providing that non-qualified ag is not to be included in the protest denominator comes as a result of an instance where Lewis and Clark County attempted to enact zoning and over 69% of the acreage within the zoning district taxed for agriculture purposes under 15-7-202 or under Title 15, Chapter 44, Part 1 as forest acreage protested the enactment. Lewis and Clark County, in response to that, diluted the pool of acreage by including land taxed as non-qualified agricultural under 15-6-133 claiming that the legislature meant for this non-qualified agriculture to be included. In spite of the clarity of the statute on its face, the actions of Lewis and Clark County require clarification and the added subsection 6B accomplishes that.

The amendments proposed in Section 3 to MCA 76-2-206 are also generated in part by actions of rogue county commissions such as Lewis and Clark. Until fairly recently, counties have enacted interim zoning under 76-2-206 under the procedural due process requirements found in the statute just prior, 76-2-205. However, two recent court decisions *Farley v Bighorn Co.* #DV-2002-75 (Mont. 22 Jud. Dist. 2003) and *Fasbender et al v. L&C Co.* BDV-2006-898 (Mont. 1st Jud. Dist. 2007), currently pending appeal in Cause #DA08-0404 before the Supreme Court of Montana, have divorced interim zoning §206 from the due process requirements of §205.

Since the judiciary's finding that the procedural due process requirements of 76-2-205 are inapplicable to interim zoning, it has no statutory due process requirements, and is probably unconstitutional on its face absent some action by the legislature to provide interim zoning a "due process".

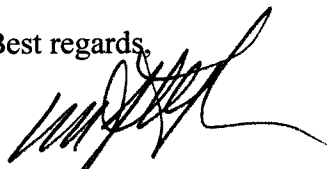
This bill protects the long standing Montana tradition of providing a check and balance to the interim zoning process by providing a freeholder protest as it does in all three parts of the zoning code, (citizen initiated, county zoning and city zoning) and, as it does in every instance where districts are created that effect real property rights. For example, the creation of conservation districts, MCA 76-15-604, the creation of water quality districts, MCA 7-13-4509, business improvement districts, MCA 7-12-1113, and city annexation, MCA 7-2-4313.

Interim zoning, which can last up to two years, can have dramatic and substantial impact on the property owners. Freeholder protests are a universal element within the statute as a check over local authority to effect private property rights and it is unnecessary to repeal the protest provision for sake of expediency in interim zoning.

Both judges, in the cases described above, raised the question: if there is an emergency, why would the legislature require the county to wait for the 30 day protest period? **The modifications in this bill provide a perfect compromise response to that question**. This bill allows the enactment to go into effect immediately upon enactment, but shifts the freeholder protest opportunity to after the enactment. In other words, instead of having to wait for the 30 day protest to occur, the regulations under interim zoning can go into effect immediately, but a protest opportunity occurs for the 30 days after enactment. If the regulation is so unpopular, or the purported emergency so flimsy as to garner a freeholder protest, the county has likely overstepped its bound with regard to its assessment of the emergency or with regard to the regulations to address that emergency and it should be repealed.

Judicial repeal of the freeholder protest provision and Planning Board review in the event of interim zoning encourages the bad behavior of indifferent county commissions and perpetuates public disdain for zoning due to these kinds of abuses. This bill provides the critical due process necessary to allow rapid response to exigent conditions and, at the same time, maintains a healthy balance between county commissions and the property owners they represent.

Best regards,



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